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DEC 23
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 118.

FLORSHEIM BROTHERS DRYGOODS COMPANY, LTD.,
Petitioner,

vs.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

PETITIONER'S BRIEF.

E. H. RANDOLPH,
ALLEN RENDALL,
A. B. FREYER,
JAMES CRAIG PEACOCK,
Counsel for Petitioner.

December, 1929.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

PETITIONER'S BRIEF.

OPINIONS OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals for the Fifth Circuit is reported at 29 F. (2d) 895, and is also printed at R. 38.

The opinion of the District Court (W. D., La.) is reported at 26 F. (2d) 505, and is also printed at R. 15.

Jurisdiction.

Judgment against the present petitioner was originally entered by the Circuit Court of Appeals on December 19, 1928 (R. 40). Petition for rehearing was filed by this petitioner on January 7, 1929, and the order denying the petition was not entered by that court until March 1, 1929 (R. 41). Petition for writ of certiorari was filed in this Court on May 31, 1929 (R. 41), which was within three months (Sec. 8 of Act of February 13, 1925, 43 Stat. 936) after the order of March 1, 1929. The three months period under such a statute runs from the date of final action on the petition for rehearing. *United States v. Ellicott,* 223 U. S. 524; *Texas & Pacific Rwy. Co. v. Murphy,* 111 U. S. 488. The petition for writ of certiorari was granted by this Court on October 14, 1929 (R. 41).

Statement of the Case.

This is a suit for the recovery by petitioner of additional income and profits taxes for 1918 on the ground that these taxes were erroneously or illegally assessed and collected within the meaning of R. S. Sec. 3226 as amended by Sec. 1113 of the Revenue Act of 1926 (44 Stat. 116).

The statutory period of limitation on assessment and collection was five years from the date of filing the return, but by written consent of the parties, it was agreed that determination, assessment, and collection might be made within one year after the end of the statutory period. The case presents two entirely in-

dependent issues arising under the statute of limitations. The first issue is whether the **assessment** was made within six years after *the return* was filed, and turns on the question as to which of two papers was the return within the meaning of the statute and therefore started the running of the statute of limitations. The second issue is whether the **collection** became barred at the end of the statutory period plus the year covered by the said consent. If the assessment was barred, then by the same token collection was also barred, but if held otherwise as to the assessment then this second issue turns on the further question of whether Sec. 278 (d) of the subsequently enacted Revenue Act of 1924 permitting collection within six years after assessment applies where a different period for both assessment and collection had already been fixed by a statutory consent in writing.

The facts are simple. Prior to March 15, 1919, petitioner was required to and did file its tentative return on Form 1031-T for 1918 (R. 2, 4, 5, and copy of Form on page 14 of insert preceding R. 31). On June 16, 1919, petitioner filed Form 1120 for the same year (R. 2, 10, and copy of Form at page 2 of insert following R. 30). Sec. 250(d) of the Revenue Act of 1921 provided that any additional tax for 1918 "shall be determined and assessed within five years after the return was filed unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no * * * proceeding for the collection of any such taxes * * * shall be begun, after the expiration of five years after the date when such return was filed." On or before March 4, 1924, petitioner filed a so-called waiver which was also signed by the Commissioner consenting "to

a determination, assessment, and collection" of taxes for 1918. The waiver expressly provided that it "will remain in effect for a period of one year after the expiration of the statutory period of limitations * * * within which assessment of taxes may be made for the year * * * mentioned." (Copy of waiver is printed at R. 15).

The parties are in agreement as to the validity of the waiver and that its effect was at least to permit both assessment and collection at any time within the additional year after the end of the statutory period. The petitioner maintains, however, that the five year period had started on the filing of Form 1031-T prior to March 15, 1919, and therefore the additional sixth year terminated not later than March 15, 1925, and that the **assessment** on June 11, 1925 (R. 39), was therefore barred. Petitioner further maintains that even should it be held that the period for assessment extended until June 16, 1925, nevertheless by virtue of the same waiver or consent the period for collection terminated on that same day and the **collection** which occurred on or after August 28, 1925 (R. 4, 11), was therefore barred. A decision favorable to our position on either of these issues is sufficient to dispose of the case by reversal of the decision below. We understand the Government's position to be that the original period did not start until the filing of Form 1120 on June 14, 1919, and that the subsequent enactment of the Revenue Act of 1924 (43 Stat. 253) on June 2, 1924, operated to modify the terms of the waiver. The court below decided both these questions in the Government's favor (R. 38, 40).

Questions Presented.

1. Whether the return on Form 1031-T was "the return" within the meaning of the statutes?

2. Whether the consent in writing could be and was changed by the subsequently enacted Revenue Act of 1924 and whether retroactive effect is to be given to Sec. 278 (d) of that Act?

Specification of Errors.

The petitioner specifies and urges the following errors as grounds for reversal of the judgment below:

1. The Court erred in holding that "the consent in writing (R. 46) simply served to enlarge the period of limitation and otherwise to leave unchanged the provisions of law relating to collection as well as to determination and assessment of the tax" and did not change the existing rights of the parties.

2. The Court erred in holding that the period of limitation for the assessment and collection of taxes began to run from the date of the filing of the completed return instead of from the date of the filing of the initial return.

3. The Court erred in holding that the case does not in any wise differ in principle from the case of *United States vs. Crooks*, 18 Fed. (2nd) 449.

4. The Court erred in refusing and failing to hold that the collection of the taxes involved was barred, at the time of collection, under the provisions of Secs. 277(a) (2), and 278(c), (d) and (e) of the Revenue Act of 1924, and Sec. 278 (d) of the Revenue Act of 1926.

SUMMARY OF ARGUMENT.

I. Form 1031-T, filed prior to March 15, 1919, was "the return" within the meaning of the statutes, and the assessment in the present case was barred because not made within the statutory five-year period plus the additional year given by the consent in writing. Page 7.

1. Form 1031-T was a sufficient return to prevent the extension of time for payment of the first installment which the statute provided in all cases of an extension of time for filing the return. Page 11.

2. Form 1031-T was a sufficient return to constitute notice and demand for payment of the first installment under the statutory provision that in the case of the first installment the instructions printed on "the return" shall be deemed sufficient notice and demand. Page 19.

3. Form 1031-T was a sufficient return to form the basis for assessments which under internal revenue law and practice must be based on a "return." Page 22.

4. Form 1031-T was a sufficient return to subject a taxpayer who failed to file it to the statutory penalties for failure to make "a return" and to make it on time. Page 25.

5. Form 1031-T was a sufficient return to be expressly so termed on its face and in the Commissioner's official statements to the public. Page 26.

6. Form 1031-T must necessarily have been the return within the meaning of the statute which contemplated only one return in each case. Page 27.

II. That Form 1031-T was "the return" has since been held by two other Federal courts in well-considered opinions which expressly decline to follow the decision of the Court of Appeals in the present case. Page 33.

III. Section 239 of the Revenue Act of 1918 does not require any different conclusion. Page 33.

IV. The additional taxes here in question were illegally collected for the further reason that they were not collected within the period for collection provided by the consent in writing or by law. Page 43.

1. The period of limitation applicable to the collection of the taxes in question was established by the agreement of March 1, 1924, between petitioner and the Commissioner of Internal Revenue. Page 46.

2. The agreement of March 1, 1924, was not affected by the Revenue Act of 1924. Page 52.

3. The language of the Revenue Act of 1924 cannot be construed to be applicable to the facts in the case at bar. Page 56.

V. Conclusion. Page 62.

ARGUMENT.

I. Form 1031-T, filed prior to March 15, 1919, was "the return" within the meaning of the statutes, and the assessment in the present case was barred because not made within the statutory five-year period plus the additional year given by the consent in writing.

We feel that at the very outset this Court may well note the somewhat unusual circumstances under which

this issue comes before it. Ordinarily a petitioner or appellant must bear the burden of the argument in overcoming whatever presumption of correctness attaches to the decision appealed from and in convincing the appellate court that it should take the affirmative step of reversing the decision below. Here, however, the situation may be somewhat different. This Court also has on its docket another case in which it has granted the Government's petition for a writ of certiorari (*White v. Hood Rubber Co.*, No. 414), and in which the decision below on this same question as to Form 1031-T is in the taxpayer's favor. It appears therefore that this Court must either reverse the decision of the Circuit Court of Appeals for the Fifth Circuit in the present case or that of the Circuit Court of Appeals for the First Circuit in the *Hood* case, and there is no presumption that the decision below in the present case is any more correct than the contrary decision in the *Hood* case. As a matter of fact the presumption might well be the other way as the *Hood* case is the more recent and the court in that case rendered a comprehensive opinion expressly considering and declining to follow the decision here appealed from. Indeed since the decision by the Court of Appeals in the present case not only has the Court of Appeals for the First Circuit considered it and declined to follow it, but still another federal court has also fully considered it and in an opinion in which its reasons are set forth at length has also expressly declined to follow it. We refer to *Brandon Corporation v. Jones*, 33 F. (2d) 969 (Dist. Ct., E. D. South Carolina), the opinion of Judge Cochran in which was adopted almost in its entirety in the opinion of the Court of Appeals in the *Hood* case.

Turning now to the statutes we find that Sec. 250(d) of the Revenue Act of 1918 (40 Stat. 1083) provided that

> "the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made * * *"

Sec. 250(d) of the Revenue Act of 1921 (42 Stat. 265) provided that

> "the amount of any such taxes due under any return made * * * under prior income, excess-profits, or war-profits tax Acts * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax;"

Secs. 277 (a) and 278 (c) of the Revenue Act of 1924 (43 Stat. 299, 300, approved June 2, 1924, a few days before this assessment was made) provided that

> "Sec. 277 (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—* * *
>
> (2) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, * * *"

and

> "Sec. 278. * * *
>
> (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment

of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon."

The return here having been filed under the Revenue Act of 1918 (40 Stat. 1057) we must turn to that Act to test the status of Form 1031-T, and unless otherwise noted the references from here on under this point are to that Act. For more convenient reference by the Court, we also insert here to face page 11 a complete copy of Form 1031-T in blank as originally furnished to taxpayers. A photostat of the Form as filled in and filed by the petitioner will be found on page 14 of the insert immediately preceding R. 31.

The petitioner submits that there can be no real question that Form 1031-T and that form alone was *the return* within the meaning of the statutes. The principal reasons in support of our position may be summarized as follows:

1. Form 1031-T was a sufficient return to prevent the extension of time for payment of the first installment which the statute provided in all cases of an extension of time for filing the return.

2. Form 1031-T was a sufficient return to constitute notice and demand for payment of the first installment under the statutory provision that in the case of the first installment the instructions printed on "the return" shall be deemed sufficient notice and demand.

3. Form 1031-T was a sufficient return to form the basis for assessments, which under internal revenue law and practice must be based on a "return."

INCOME AND PROFITS TAXES

AND

EXTENSION OF TIME FOR FILING RETURN

TAX RETURN AND ESTIMATE

OF

ORIGINAL

THIS FORM WITH DUPLICATE AND REMITTANCE COVERING ONE-FOURTH OF ESTIMATED TAX MUST REACH THE COLLECTOR'S OFFICE ON OR BEFORE MARCH 15, 1919.

Form 1031 T—UNITED STATES INTERNAL REVENUE SERVICE

TENTATIVE RETURN AND ESMATE OF CORPORATION INCOME AND PROTS TAXES AND REQUEST FOR EXTENSION OF TIME FOR FIG RETURN

PRINT BELOW TAXPAYER'S NAME AND PRINCIPAL PLI OF BUSINESS

Do not write in this space

AMOUNT PAID

$_____

(Cashier's Stamp)

Check or draft _____

Money order _____

Currency or coin _____

Certificate of indebtedness _____

Date_____ (To be entered in payer.) No._____ (To be entered by Collector.)

Collector of Internal Revenue,

_____

The amount stated below is remitted herewith in payment of not less than one-fo th of the estimated amount of the income, war-profits, and excess-profits taxes for the year ended _____ of the corporation whose name and address appear at the head of this form.

An extension of _____ days in the time allowed for filing a complete return is requested.

It is not possible to file a completed return on or before March 15, 1919, for the following reasons:

_____

_____

_____

NOTE.—A parent company may make a tentative return and pay the first instalment of the tax on behalf of all its subsidiaries without apportioning the tax among them until the completed return is filed.

Estimated amount of tax _____ $_____

Amount of remittance herewith:

Check or draft.	Money order.	Currency or coin.	Certificates of indebtedness.	Total
$	$	$	$	$

AFFIDAVIT

The undersigned, president and treasurer, respectively, of the corporation whose name and address appear at the head of this form, being severally duly sworn, each for himself deposes and says that the foregoing is a fair estimate of the total amount of the income, war-profits and excess-profits taxes of the said corporation for the period stated above, and that the above-stated reasons

...PLICATE
...be sent to Collec-
...or with original)

THIS FORM
...ULY APPROVED
BY THE
...OLLECTOR MUST
ACCOMPANY
...HE TAXPAYER'S
COMPLETED
RETURN
WHEN FILED

TENTATIVE RETURN AND ESTIMATE
OF
CORPORATION INCOME AND PROFITS TAXES
AND
REQUEST FOR EXTENSION OF TIME FOR FILING RETURN

PRINT BELOW TAXPAYER'S NAME AND PRINCIPAL PLACE OF BUSINESS

FOLD OUT IS TOO LARGE TO BE FILMED

...PENALTIES

For Making False or Fraudulent Return.

Not exceeding $10,000 or not exceeding one year's imprisonment, or both, in the discretion of the court, and, in addition, 50 per cent of the tax evaded.

For Failing to Make Return on Time.

Not more than $1,000, and, in addition, 25 per cent of the amount of tax due.

Date _____ (To be entered by taxpayer.) No. _____ (To be entered by Collector.)

...llector of Internal Revenue.

_____

The amount stated below is remitted herewith in payment of not less than one-fourth of the estimated amount of the income, war-...fits, and excess-profits taxes for the year ended _____ of the corporation ...se name and address appear at the head of this form.

An extension of _____ days in the time allowed for filing a completed return is requested.

It is not possible to file a completed return on or before March 15, 1919, for the following reasons:

_____

_____

_____

NOTE.—A parent company may make a tentative return and pay the first installment of the tax on behalf of all its subsidiaries ...out apportioning the tax among them until the completed return is filed.

...mated amount of tax _____ $_____

...unt of remittance herewith:

Check or draft.	Money order.	Currency or coin.	Certificates of indebtedness	Total.
	$	$	$	$

COLLECTOR'S APPROVAL.

In consideration of the filing of this tentative return and the payment of not less than one-fourth of the estimated amount of the tax, ...for the reasons stated above, the time for filing the completed return of the taxpayer whose name and address appear at the head ...is form is hereby extended, by authority of the Commissioner of Internal Revenue, until _____

If the remittance accompanying this tentative return exceeds one-fourth of the tax as computed on the completed return, the ...s will be credited against the balance remaining to be paid. If the remittance is less than one-fourth of the tax, the balance ...with interest at the rate of six per cent per annum from March 15, 1919, must accompany the completed return. If the amount ...exceeds the total tax as shown by the completed return the excess will be refunded.

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4. Form 1031-T was a sufficient return to subject a taxpayer who failed to file it to the statutory penalties for failure to make a "return" and to make it on time.

5. Form 1031-T was a sufficient return to be expressly so termed on its face and in the Commissioner's official statements to the public.

6. Form 1031-T must necessarily have been "the return" within the meaning of the statute which contemplated only one return in each case.

We now proceed to consider in detail each of the above mentioned points in the order named.

1. *Form 1031-T was a sufficient return to prevent the extension of time for payment of the first installment which the statute provided in all cases of an extension of time for filing the return.*

Sections 227(a) and 241(a) of the Revenue Act of 1918 (40 Stat. 1075-1082) required that returns for the calendar year 1918 be filed on or before March 15, 1919, but provided further that the Commissioner of Internal Revenue might grant a reasonable extension of time for filing returns.

Section 250(a) of the same act (40 Stat. 1082) provided that the tax shall be paid in equal quarterly installments, that the first installment shall be paid at the time fixed by law for filing the return, and that:

> "Where an extension of time for filing a return is granted the time for payment of the first installment shall be postponed until the date of the expiration of the period of the extension, but the time for payment of the other installments shall not be postponed unless the Commissioner so pro-

> vides in granting the extension. In any case in which the time for the payment of any installment is at the request of the taxpayer thus postponed, there shall be added as part of such installment interest thereon at the rate of 1/2 of 1 per centum per month from the time it would have been due if no extension had been granted until paid."

It will be noted that if the Commissioner granted an extension on his own initiative the time for payment of the first installment would have been correspondingly extended and there would have been no interest payable for such period by the taxpayers.

The income and profits taxes of 1918 constituted the greatest single levy of any tax in the history of our country, and it is common knowledge that the first installment due on March 15, 1919, alone amounted to approximately $1,200,000,000, and that the financial condition of the Government was such that it could not permit any extension of the time for the collection of that installment. One single need in itself called for $800,000,000 as had already been announced by an administration spokesman on the floor of the Senate on February 11, 1919, when Senator Simmons, Chairman of the Finance Committee, in presenting the report of the conferees on the Revenue Act of 1918, said:

> "In order to bring the two Houses together upon these 602 amendments, it is obvious that a vast amount of work was required. That the conferees were able to accomplish this result in a little over two weeks shows that their work was constant and diligent; but even with the greatest diligence, Mr. President, it would have been impossible to accomplish this result within so short a time had not every member of the conference been alive to the

fact that the exigencies of the situation required the utmost speed.

I desire to say to the Senators who do me the honor to hear the brief statement I am going to make, that I am advised by the Commissioner of Internal Revenue and the Secretary of the Treasury that Government obligations amounting to more than $800,000,000 will mature and will have to be paid by the 15th day of March next, and that the money which it is expected to realize from the first installment under this bill has been pledged for the payment of those maturing obligations.

The Commissioner of Internal Revenue further advises me that, relying upon the assurances that were given to him by the conferees that this bill could be passed at this session, and passed within a short time, he has abandoned all purpose of arranging to collect taxes except under this bill, and that if for any reason this bill should fail or be delayed so long as to make it impossible for him to collect the taxes this year under it the Treasury Department and the Government would be placed in a most embarrassing position." (Cong. Rec., 57th Cong., p. 3131.)

The bill was promptly passed and was approved by the President on February 24, 1919.

Meanwhile on February 13, 1919, the Commissioner of Internal Revenue had issued the following public statement (italicizing supplied):

"To collectors of internal revenue and others concerned:

Although *no general extension of time will be authorized for filing Federal Income Tax returns due March 15,* the Commissioner of Internal Revenue has approved a novel feature of tax collection which will serve for all practical purposes as a possible extension of forty-five days for the filing

of corporation income and excess profits tax returns in cases where corporations are unable to complete and file their returns of March 15.

If a corporation finds that, for good and sufficient reason, it is impossible to complete its return by March 15, *it may make a return of the estimated tax due and make payment thereof not later than March 15.* If meritorious reason is shown as to why the corporation is unable to complete its return by the specified date, the collector will accept the payment of the estimated tax and agree to accept the revised and completed tax return within a period of not more than 45 days.

Under the plan adopted for corporation payments and returns, *the Government will be able to collect approximately the amount of tax due on or before March 15, thus meeting its urgent needs,* and corporations actually requiring further time for the preparation of their complete returns will be granted ample time in which to do so.

One of the advantages of this plan is that it relieves the taxpayer of one-half of one per cent interest per month that would be attached to the payment of the taxes under an extension granted at the request of the taxpayer. The taxpayer will, of course, not be relieved of interest on such amount as his payment may fall short of the tax found later to be due on the basis of his final return.

Should the payment on March 15 of the estimated tax due be greater than the tax eventually found to be due on examination of the completed return the excess payment will automatically be credited to the next installment which will be due on June 15.

Provision for systematically handling this new feature will be made in the construction of the new return blanks for corporations. The new form will be a combined income and excess profits blank, embodied in which is a detachable letter of

remittance. Any corporation which finds that, for sufficient reasons, it cannot complete its return by March 15, may detach and fill out the letter of remittance, and forward same to the collector on or before March 15, together with a check, money-order or draft for the tax due on that date. If the exact tax is not known the estimated tax due will be paid in this manner. A statement in writing of the reasons why it is impossible for the corporation to complete the return by the specified date must accompany every such remittance.

Individual taxpayers will be given similar privileges in cases in which it is made clear by the taxpayer that the time available is not sufficient to enable him to complete his return by March 15. No reason exists, according to the Internal Revenue officials, for delaying the filing of the returns of individual incomes, except in unusually difficult cases.

Forms for returns of individual incomes up to $5,000 will be distributed by collectors within a few days. Forms for larger incomes will be available about February 24. Corporation blanks will be distributed March 1. Regulations governing the administration of the new Income Tax will also be available before March 1.
February 13, 1919.

DANIEL C. ROPER,
Commissioner of Internal Revenue,"

and again on February 27, 1919, he issued an additional statement modifying somewhat the procedure suggested in the earlier statement (italicizing supplied):

"Treasury Department,
Office of Commissioner of Internal Revenue,
Washington, D. C.

Income taxpayers both corporations and individual, were today granted by the Internal Revenue Bureau further relief with respect to the filing of their completed tax returns for 1918. The statement that the taxpayer is unable by March 15, to execute and file the complete return will be accepted, under the new procedure, as sufficient reason for extending for forty-five days the time for filing complete income and excess profits returns, *provided in every case the taxpayer pays on or before March 15 at least 25% of the estimated amount of the tax due.*

A supply of blanks of Form 1040-T, for the use of individuals as tentative return on the estimated tax basis, were shipped to each collector of Internal Revenue today. Collectors will furnish this Form to any individual requesting an extension of time for the filing of his complete return for 1918.

The tentative *return to be used by corporations* who make payment of the estimated tax due on or before March 15 is being printed, **and a supply will be forwarded tomorrow to each collector, who will mail these Forms to every corporation on his list. (To be known as Form 1031-T.)**

Under the estimated tax procedure, which is now available to every taxpayer under the Income and Excess Profits Section of the New Revenue Law, *there is no extension beyond the legal due date, March 15, for the payment of the taxes then falling due.*

It is urged by the Bureau that the estimates be computed on the most exact basis available. Should the first payment to be made on or before March 15, under this plan, be greater than the amount eventually found to have been due upon examination of the completed return the excess

payment will be automatically credited against the next installment, which will be due June 15.

The taxpayer will not be relieved, however, under this plan, of the interest due upon any amount by which his payment on March 15 may fall short of the amount found to have been due upon examination of the completed return.

Commissioner Daniel C. Roper, in announcing the further relief for taxpayers in the matter of completing their returns, stated that he believed the plan is not only simple and workable, *but adequately protects the interests of* the taxpayer and *the Government.*

February 27, 1919."

That this plan was solely in the interests of the Government and against rather than for the interests of taxpayers as such is only too obvious. There was of course never any question that the nineteen days remaining after the enactment of the revised income tax and the entirely new war profits tax was insufficient for the Commissioner to formulate and distribute throughout the country the necessary regulations and forms and for the taxpayers to complete and return them. Two alternatives confronted the Commissioner. Either he could grant a general extension for filling returns (which would carry with it a corresponding extension of the due date of the first installment), or he could require *a return* to be filed in any event by March 15, subject to whatever completion or correction might later be necessary. The essential difference between the plans was whether the taxpayers or the Government should have the use of over a billion dollars for an additional month or two.

It was for its own benefit therefore that the Govern-

ment devised this plan, the very keystone of which was the required filing of Form 1031-T *as a return*. Having reaped all the tremendous benefits of Form 1031-T being a return when it needed that form to be a return, it cannot now be heard to say that that form which it itself devised *as a return* was not a return. When the Commissioner elected not to grant any extension of time for filing returns, and distributed Form 1031-T to be filed as a return, he was acting within the provisions of the statute (*White v. Hood Rubber Co.*, 33 F. (2d) 739, 742) and by the same token he legally and irrevocably denominated Form 1031-T as *the return*.

And the courts have so held. In *Brandon Corporation v. Jones*, 33 F. (2d) 969, Judge Cochran expressly declined to follow the decision in the present case which is here appealed from and said at page 971:

> "It is clear, therefore, that the filing of Form 1031-T constituted such a return as to prevent the extension of time for payment of the first installment which the statute provided in all cases of an extension of time for the filing of a return. See sections 227(a) and 241(a) of the Revenue Act of 1918 (40 Stat. 1075, 1082), and section 250(a) of the same act (40 Stat. 1082).
>
> It is common knowledge that the Revenue Act of 1918 constituted the greatest single levy of any tax in the history of the country, and that the financial condition of the government was such that it could not permit any extension of time for the collection of the first installment. It was for its own benefit largely that the government devised the plan of tentative returns. This procedure established by the Commissioner of Internal Revenue under the rulings of February 13, 1919, and February 27, 1919, expressly required therefore the filing of a return on March 15, 1919,

> and expressly provided that there was no extension beyond that date of the time for the payment of the first installment. The Commissioner therefore elected not to grant any extension of time for filing these returns, and it necessarily follows that the return which he then required must be deemed the return contemplated by the statute whether termed merely a tentative return or not."

In *White v. Hood Rubber Co.*, 33 F. (2d) 739, the Circuit Court of Appeals for the First Circuit likewise declined to follow the decision in the case at bar, and adopted and quoted almost in its entirety Judge Cochran's opinion in the *Brandon* case.

2. *Form 1031-T was a sufficient return to constitute notice and demand for payment of the first installment under the statutory provision that in the case of the first installment the instructions printed on "the return" shall be deemed sufficient notice and demand.*

Section 250(e) of the same act (40 Stat. 1083) provided that if any tax remained unpaid after it was due and for ten days after notice and demand by the Collector there should be added a penalty of 5 per cent plus interest at the rate of 1 per cent per month. Notice and demand by the local collector was a condition prerequisite to enforcing the collection of any tax, and it was only after such a notice and demand had been ignored for more than ten days that the tax could be collected by distraint or otherwise, and that penalty and interest could be asserted. The same section also provided, however, that—

> "In the case of the first installment provided for in subdivision (a) the instructions printed on the

return shall be deemed sufficient notice of the date when the tax is due and sufficient demand, and the taxpayer's computation of the tax on the return shall be deemed sufficient notice of the amount due."

It will be noted that it was the instructions printed *on the return* which were thus constituted by the statute sufficient notice and demand for the payment of the first installment and that it was the taxpayer's computation of the tax *on the return* which was in the same way constituted sufficient notice of the amount of the tax.

Form 1031-T (a copy of which faces page 11) provided for a tentative determination of the amount of the tax and carried in the usual form in the upper left-hand corner of the "Original" the following demand for payment of the first installment on or before March 15, 1919, as authorized by the statute—

"THIS FORM WITH DUPLICATE AND REMITTANCE COVERING ONE-FOURTH OF ESTIMATED TAX MUST REACH THE COLLECTOR'S OFFICE ON OR BEFORE MARCH 15, 1919."

The return on Form 1031-T which was thus required to be filed on or before March 15, 1919, together with a remittance for the first quarterly installment, must necessarily have been *the return* for the year 1918 as required by law.

Contemporary construction and application of the

statute by the authorities charged with its administration is entitled to great weight and should not be overturned except for cogent reasons. *United States v. Johnston*, 124 U. S. 236; *Logan v. Davis*, 233 U. S. 613, 627, and cases there cited. The statement of the rule in the latter case to the effect that "the *practical* interpretation" of a statute by the executive department charged with its administration is entitled to the highest respect and ordinarily will not be changed is especially applicable where, as here, the Government authorities so definitely elected to treat Form 1031-T as *the return*. If it was "the return" when they needed the immediate payment of $1,200,000,000, and if it was "the return" when it was necessary to treat it as such in order to save to the Government interest at the rate of 6 per cent for one or more months on that same $1,200,000,000, and if it was "the return" when they needed it as such in order to constitute the notice and demand which was a legal prerequisite to collection of that $1,200,000,000, can they now be permitted to claim that it was not the return because with the emergency over and having irretrievably gotten the full benefit of treating it as "the return" they can now in a few isolated cases get a little more benefit by taking the contrary position? Either it was the return or it was not the return, and to hold that it was not the return must at the same time be to hold that $1,200,000,000 was collected by our Government as taxes without any authority at all. When the Government's position is stated in this way it becomes apparent how ridiculous it is. There has never been a single reason advanced or suggested which would give any support whatever to a charge that this procedure on the part of the Government authorities in 1919 was un-

authorized, and unless it can be demonstrated to have been unauthorized Form 1031-T must have been *the return within the meaning of the statutes.*

And here again the courts have so held. In the *Brandon* case Judge Cochran also said at 33 F. (2d) 969, 971:

> "But the tentative return was sufficient to constitute a return in another aspect. Section 250(e) of the same act (40 Stat. 1083) provides that if any tax remains unpaid after it is due and for 10 days after notice and demand, there should be added a penalty. Notice and demand were a condition prerequisite to the collection of the tax; but the same section provided that in the case of the first installment, the instructions printed on the return should be deemed sufficient notice of the date when the tax is due, and sufficient demand. Form 1031-T contained instructions complying therewith, and was a sufficient notice and demand to make the first installment payable on March 15, 1919."

and in the *Hood* case the Circuit Court of Appeals for the First Circuit at 33 F. (2d) 739, 742, also adopted in full this part of his opinion.

3. Form 1031-T was a sufficient return to form the basis for assessments which under internal revenue law and practice must be based on a "return."

Under internal revenue statutes and procedure a "return" was a necessary prerequisite to the making of an assessment, and the Commissioner has always considered Form 1031-T as "the return" for that purpose. Internal revenue procedure, as developed in the administration of the minor taxes in effect prior to

the ratification of the income tax amendment, was thereafter adopted in large part for the administration of the income and profits taxes. That procedure contemplated an assessment by the Commissioner based on a return by the taxpayer. It was expressly adopted for income tax purposes by the Revenue Act of 1918 for the year 1918 here in question. Section 250(d) of that Act provides that—

> "the amount of tax *due under any return* shall be determined and assessed by the Commissioner within five years after the return was due and was made."

and instead of this section following immediately after Sec. 250(b), which directs the Commissioner to examine returns filed by the taxpayer in the regular way, there was deliberately inserted between the two sections the further provision of Section 250(c) incorporating by reference R. S. Sec. 3176 (which directs the Collector or the Commissioner to make a return from his own knowledge in every case where the taxpayer fails to make a return). Congress thus made it clear that Sec. 3176 applies to income and profits tax returns and that assessment of such taxes as authorized in Section 250(d) is based in every instance on a return, which is to be made by the Collector or the Commissioner in the event of failure on the part of the taxpayer.

With this word of preliminary explanation let us now inquire whether a so-called tentative return has been considered sufficient ground for an assessment, and we find as a still further instance of "practical interpretation" by the executive department that it most certainly has been so considered. It has already

been shown that no extension of time for filing the return for 1918 was granted to taxpayers as a whole (including the petitioner), but there were of course some instances where because of special reasons an extension of time for filing any return was needed. Art. 444 of Regulations 45, relative to the granting of such extensions by the Commissioner, provided—

> "The Commissioner will grant no such extension beyond the original due date of the third installment of the tax. Either a complete or *a tentative return,* as complete as possible and *giving a ground for assessment of the tax,* must be submitted on or before the due date as extended."

These regulations, originally promulgated March 5, 1919 (Corp. Trust Income Tax Service, 1919, par. 3245), and in effect when the tentative return in the present case was filed, were made by the Commissioner and the Secretary of the Treasury under the authority of Sec. 1309 of the Revenue Act of 1918 and have the same force and effect as a statute (*In re. Kollock,* 165 U. S. 526; *Maryland Casualty Co. v. U. S.,* 251 U. S. 342, 359).

In accordance with these regulations the Commissioner has always considered that assessments may properly be made on such tentative returns, and for concrete examples of assessments made on tentative returns on Forms 1031-T or 1040-T for 1918 filed in March, 1919, (the same as in the present case) see the findings of fact in *Matteawan Manufacturing Co.,* 14 B. T. A. 789, (corporation return on 1031-T), and *Arthur H. Lamborn, et. al.,* 13 B. T. A. 177, (individual returns on Form 1040-T).

If Form 1031-T is *the return* for purposes of mak-

ing an original assessment against the taxpayer, then by the same token it must also be *the return* for purposes of starting the running of the statutory limitation on the making of additional assessments against that same taxpayer. This reasoning has also been approved in the *Brandon* case, 33 F. (2d) 969, 972.

4. Form 1031-T was a sufficient return to subject a taxpayer who failed to file it to the statutory penalties for failure to make "a return" and to make it on time.

Section 3176 of the Revised Statutes and Section 253 of the Revenue Act of 1918 (40 Stat. 1085) provided severe penalties for making a false or fraudulent *return* or for failure to make a *return* on time. These penalties are printed in a conspicuous place on the "Duplicate" page of 1031-T, and, taken in connection with the notice and demand printed on the form that it must be filed on or before March 15, there is no question that when to its interest to do so the Government held that these penalties applied to Form 1031-T just the same as to any other return, and that it was intended to convey that impression to the taxpayers. Here again, will the Government concede that these various penalty provisions as well as the notice and demand for filing the return or paying the tax were unlawfully printed and asserted on Form 1031-T? The assertion of such penalties would be legal because it falls within the provision of Art. 407 of Regulations 45 (which under the authorities just cited under subpoint 3 has the force of law) that—

> "In lack of a prescribed form a statement made by a taxpayer disclosing his gross income and the deductions therefrom may be accepted as a

> tentative return, and if filed within the prescribed time a return so made will relieve the taxpayer from liability to penalties, provided that without unnecessary delay such a tentative return *is replaced* by a return made on the proper form."

As was said in the *Brandon* case, 33 F. (2d) 969, at page 972 (and also in part in the *Hood* case, 33 F. (2d), 739, 742):

> "Again, Form 1031-T contained an explicit statement of the penalty that would attach in case of failure to make return. The filing of this form prevented the attaching of the penalty. It must therefore be deemed a sufficient return so far as the imposition of this penalty is concerned. It is clearly therefore a return for that purpose.
>
> There are other purposes for which the tentative return is treated as a return, but it is unnecessary to pursue the discussion further on that line."

5. *Form 1031-T was a sufficient return to be expressly so termed on its face and in the Commissioner's official statements to the public.*

We cannot better express our position on this aspect of the case than has already been done for us by the courts in the *Brandon* and the *Hood* cases, where at 33 F. (2d) 971 and 33 F. (2d) 741 it is said:

> "The tentative return certainly cannot be construed to be merely an agreement for extension of time, and to constitute no return in any aspect. The Commissioner in his ruling of February 13, 1919, called it a 'return' and in the ruling of February 27, 1919, a 'tentative return.' In Form 1031-T itself, it is called a tentative return. There was certainly some reason for insisting that the paper be styled a tentative return. If it was not

a return at all, but merely an agreement for an extension of time, the taxpayer was not bound to pay the first installment of his taxes until he filed the completed return. It is clear, therefore, that the filing of Form 1031-T constituted such a return as to prevent the extension of time for payment of the first installment which the statute provided in all cases of an extension of time for the filing of a return. See sections 227(a) and 241(a) of the Revenue Act of 1918 (40 Stat. 1075, 1082), and section 250(a) of the same act (40 Stat. 1082)."

And if there still could be any question that Form 1031-T was the return it is to be remembered that this form was not drawn up by this petitioner but was prepared and distributed by the respondent itself. We have in mind of course that cardinal rule of construction that "in cases of doubt, the instrument will be construed most strongly against the person who actually drew up the paper, or in whose behalf it was drawn"—

Perkins Oil Company v. Eberhard, (Tenn.) 64 S. W. 762;
Marx v. American Malting Co., 169 Fed. 582;
Bijur Motor Co. v. Eclipse Mach. Co., 237 Fed. 89;
Williston on Contracts, Sec. 621, Note 9 and cases there cited.

6. *Form 1031-T must necessarily have been the return within the meaning of the statute which contemplated only one return in each case.*

Sections 227, 239, 241 and 250 of the Revenue Act of 1918 (40 Stat. 1075-1083) which relate in one way or another to the filing of corporation returns for 1918

are unanimous in their reference to "a return" or "the return" always in the singular number, and it is well established that one and only one return was required or contemplated by the statute, and that if revised, or completed, or amended returns were subsequently filed they related back to the initial return *nunc pro tunc:*

> *National Refining Company,* 1 B. T. A. 236;
> *Mabel Elevator Co.,* 2 B. T. A. 517;
> *Union Pacific R. R. v. Bowers,* 24 F. (2d) 788;
> *Thomas v. United States,* 22 F. (2d) 1000;
> Regulations 45, Article 407.

In the *National Refining Company* and the *Mabel Elevator Company* cases, the Board of Tax Appeals held that the filing of an amended return does not start anew the running of the statute of limitations and overruled the prior holding of the Commissioner of Internal Revenue (I. T. 1714) to the contrary. In the *National Refining Company* case the initial return for 1917 had been filed on March 15, 1918, and on October 11, 1923, an amended return was filed. After pointing out at page 240 that "we cannot find in any of the acts any express language or implication that amended returns are contemplated or that they will be given any special significance," the Board continued at page 241 (italics in original)—

> "Sections 250(d) of the Act of 1921 and 277(a)(2) of the Act of 1924 provide that the limitation shall operate 'five years after *the return* was filed.' The phrase *the return* has a definite article and a singular subject; therefore, it can only mean one return, and that *the return* contemplated by the act under which it was filed. The Revenue Acts

of 1916 and 1917 provided for the time and place of filing returns in identical language (Sec. 13(b)(1)), and specified:

> *The return* shall be made to the collector of the district in which is located the principal office of the corporation, company, or association, where are kept its books of account and other data from which *the return* is prepared. * * * (Italics ours.)

Again we find a definite article and a definite subject described, viz, *the return.* The language of the sections referred to does not describe *any return* or *many returns,* but one special return which is to be filed in one special place at or within a specified time. The taxpayer complied with the law when it filed returns on March 15, 1918, and the Commissioner had five years from that time within which to assess and collect the taxes thereon. This period was extended to March 5, 1924, by express waivers being filed by the taxpayer and approved by the Commissioner.

The taxpayer's Exhibit 5 can not be considered a return within the contemplation of the Revenue Act of 1921, because (1) the only return contemplated by the act had been filed on March 15, 1918; (2) it was not intended to be anything but evidence by the taxpayer; (3) it was not filed in the office of the collector of the district in which the principal office of the corporation is located; and, (4) if it could be a proper amendment and was properly filed, it would operate to amend or correct *nunc pro tunc* as of the date of filing of the original."

In *Union Pacific R. R. Co. v. Bowers,* the taxpayer in 1925 filed an amended return for 1922 and paid a tax liability shown thereon in addition to that on the original return. The only question was whether, hav-

ing voluntarily filed the amended return, it was liable for interest on a deficiency from the date when the tax should have originally been paid. In holding that it was so liable the Circuit Court of Appeals for the Second Circuit, after quoting the provision of Section 250(d) of the Revenue Act of 1921 which is identical with the provisions of Section 250(d) of the Revenue Act of 1918 to the effect that:

> "If it then appears that the correct amount of the tax is greater or less than that shown *in the return,* the installments shall be recomputed."

held at page 790—

> " 'If it then appears' means appears at the time when the Commissioner makes his examination, but it does not follow that the Commissioner has a right to make his recomputation upon the basis of an amended return filed to correct mistakes. *The original return alone has any statutory recognition* and still showed a 'deficiency' of $413,724, in view of the information available at the time the Commissioner made the assessments of $44,475.32, interest due in September, 1925." (Italicizing supplied)

In *Thomas v. United States,* 22 F. (2d) 1000, a taxpayer and his wife had made a joint return and the question was whether the statute of limitations ran from the date of that return or from the date of two separate returns which they were later permitted to file. The court held that the statute had run because the later returns should be treated

> "as amended returns; an amendment that *related* back to the original."

In Article 407 of Regulations 45 under this same Revenue Act of 1918 it is provided:

> "In lack of a prescribed form a statement made by a taxpayer disclosing his gross income and the deductions therefrom may be accepted as a tentative return, and if filed within the prescribed time a return so made will relieve the taxpayer from liability to penalties, provided that without unnecessary delay such a tentative return *is replaced* by a return made on the proper form." (Italicizing ours.)

This view has been most forcibly and convincingly expressed by the courts in the following paragraph from the opinion in the *Brandon* case (33 F. (2d) 969, 972) which has also been repeated and adopted in full in the opinion in the *Hood* case (33 F. (2d) 739, 742):

> "The law clearly contemplates, so far as the starting of the statute of limitations is concerned, but one return. That return may not be complete in all particulars. It may be the subject of amendment; but if it is presented bona fide, and is a return for any purpose under the statute, then it must be a sufficient return to start the running of the statute. The government cannot blow hot and cold. It cannot say to the taxpayer, 'File a paper which we know to be incomplete and does not give all the information required by law, and pay us the first installment and we will allow you later to complete your return, and readjust the amount of taxes in accordance with the completed return,' and then say later that, 'the first paper which you filed was no return and the statute must start from the date of the final completed return.' It cannot say, when its interests require it to do so, that the tentative return is a return, and then, when its interests require the contrary, say that it is no return."

Just as in *Loewer Realty Co. v. Anderson*, 31 F. (2d) 268, at page 270, the Circuit Court of Appeals (2nd) well said that—

> "the taxpayer should not in any event be allowed to repudiate a consent upon which the Commissioner has relied,"

so here the Commissioner should not be allowed to repudiate a return on which not only this petitioner, but all the taxpayers of the country, were forced by the Commissioner to act and to pay hundreds of millions of taxes.

We submit that there can be no question that in the present case the complete return related back to and amended the initial return on Form 1031-T filed March 15, 1919, and that that initial return was therefore the one contemplated by the statutes for all purposes.

We feel that in common fairness, this Government which has very properly treated Form 1031-T as *the return* on the various occasions when it was so tremendously to its advantage to do so, should treat it, or be compelled to treat it, as *the return* for all purposes. And when as here our arguments on both an equitable and a legal basis so far outweigh as well as outnumber the only even partial argument which has ever been seriously advanced on the other side (which we discuss below in Point III), we submit that there is all the more reason why the decision below should be reversed.

II. That Form 1031-T was "the return" has since been held by two other Federal courts in well-considered opinions which expressly decline to follow the decision of the Court of Appeals in the present case.

Under Point I of this brief we have made such constant references to and quotations from the *Brandon* and *Hood* cases that further discussion of those cases seems unnecessary. The full text of those two opinions, however, will be found printed as Appendices A and B at pages 63 and 71 respectively at the end of this brief.

III. Section 239 of the Revenue Act of 1918 does not require any different conclusion.

In the case at bar the Circuit Court of Appeals failed to state its reasons for its adverse decision on the question of Form 1031-T, but the opinion indicates very clearly that the court did not thoroughly consider the question although it was discussed at considerable length in the briefs of both parties in that court. The only possible argument on the other side that we can conceive could be even seriously advanced might be that this form was not a return because it may not fully conform to all the provisions of that part of Sec. 239 of the Revenue Act of 1918 (40 Stat. 1081) which reads:

> "Sec. 239. That every corporation subject to taxation under this title and every personal service corporation shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer or assistant treasurer. * * *"

Such a contention, however, is most unconvincing as compared with the overwhelming weight of the argument the other way as set forth in Point I, *supra*.

It is true that such a suggestion was at the outset accorded some semblance of authority in an early decision of the Board of Tax Appeals (*Appeal of Dallas Brass & Copper Co.* 3 B. T. A. 856, 864), but examination of the record and briefs in that case show that the far more than countervailing arguments the other way were neither suggested to nor considered by the Board. Not only, however, has the reasoning in that case been rejected by the courts, but it is out of line and inconsistent with the Board's own more fully considered opinions on closely related points.

Both of these thoughts are brought out in the opinion of Judge Gilbert in *Rasmussen v. Brownfield*, 31 F. (2d) 89 (C. C. A. 9th Circuit), where he said at page 91:

> "Two income tax returns were filed by the plaintiff for the year ending January 31, 1919, a tentative return on March 15, 1919, and a complete return on June 16, 1919. The warrant of distraint was issued six years and one day after the first return was filed and five years and nine months after the second return was filed. The defendant contends that the statute of limitations began to run from the latter date. The pleadings disclose the fact that the second or complete return was only an itemized statement explanatory of the facts set forth in the prior return, and exhibited no additional or further tax liability than was disclosed by the former. The defendant relies upon the decision on the *Appeal of the Dallas Brass & Copper Co.*, 3 U. S. B. T. A. 856, in which it was held of the tentative return there involved, that for the reason that it contained none of the

information required by Sec. 239 of the Revenue Act of 1918, it must be regarded only as a request for an extension of time within which to file a return, and that the taxpayer could with no degree of propriety claim that the simple form used by it which contained none of the information required by the statute was a return which could start the running of the statute of limitations. To the same effect the defendant cites *Appeal of Boston Hide & Leather Co.*, 5 U. S. B. T. A. 617. But the same board held on the appeal in the *National Refining Company*, 1 U. S. B. T. A. 236, that the statute runs from the date of the original return. After reviewing the statutes the board said: 'We cannot find in any of the acts any expressed language or implication that amended returns are contemplated or will be given any special significance,' and the board quoted the ruling of the Solicitor that the filing of an amended return does not extend the date for the beginning of the running of the statue of limitations as outlined in Section 250(d) of the 1921 Act, but that the return referred to is the original return, with the exception that where additional taxes are disclosed by an amended return the return amounts to a limited waiver of the taxpayer to have such additional taxes determined, assessed and collected within the five year period, and the board held that the phrase 'the return' has a definite article and a single subject and therefore can only mean one return, the return contemplated by the act, citing *National Refining Co. Ohio*, 1 B. T. A. 240, 241."

Even more specific is the pungent comment in the *Brandon* case, 33 F. (2d) 969, where Judge Cochran said at page 972:

"It is argued, however, that the Board of Tax Appeals has consistently held that the statute does

not begin to run from the date of the filing of the tentative return, but from that of the completed return. *Appeal of Dallas Brass & Copper Co.*, 3 B. T. A. 856, 864; *Appeal of Boston Hide & Leather Co.*, 5 B. T. A. 617; *S. Walter Kaufman v. Commissioner of Internal Revenue*, 14 B. T. A. 602; *Reliance Mfg. Co. v. Commissioner of Internal Revenue*, 7 B. T. A. 583.

The rulings of the Board are entitled, of course, to great respect, but I am not bound by them. I have read them carefully and considered the reasoning of the Board in reaching their conclusion. But that reasoning does not seem to me convincing. It proceeds wholly upon the theory that because the tentative return does not contain the information it should contain, it must therefore be disregarded *as a return* and treated 'only as a request for an extension of time.' It ignores entirely the fact that the tentative return is effective as a return for certain purposes. These cases do not advert to the arguments that have been made before me that the tentative return must be deemed, and has been treated by the Board, as a return for some purposes."

and in the *Hood* case, 33 F. (2d) 739, where the Circuit Court of Appeals reached a similar decision on the authority of the *Brandon* case, and added at page 742—

"There are also decisions involving questions of like import, where the original return was incomplete in certain respects, and it was held that the supplemental return operated as an amendment of and related back to the original return, which fixed the time for reckoning the period of limitation. *Thomas v. United States* (D. C.) 22 F. (2d) 1000; *United States v. Mabel Elevator Co.* (D. C.) 17 F. (2d) 109."

Any weight that might once have been given to an argument such as that of the *Dallas Brass & Copper* case has since been impaired to the very vanishing point by a long line of decisions which establish that strict compliance with Sec. 239 is not an essential test of what is or is not a return within the meaning of the statute—

United States v. Mabel Elevator Co., 17 F. (2d) 109;
Lancaster Lens Co., 10 B. T. A. 1155;
Stetson & Ellison, 11 B. T. A. 397;
National Tank & Export Co. v. United States, 35 F. (2d) 381;
Colmer-Green Lumber Co., 12 B. T. A. 256;
Cf. also Regulations 45, Arts. 52 and 407.

All of the above cases related to exactly the same kind of question as in the present case, viz., whether a given return constituted a sufficient return to start the running of the statutory limitation against assessment or collection, and it is highly significant that several of them are more recent decisions of the Board of Tax Appeals itself.

In the *Mabel Elevator Co.* case, which in effect was an appeal from the decision of the Board of Tax Appeals already referred to in this brief, the court said—

> "It comes down to the question as to whether, when a taxpayer makes an honest return, which he believes to be in compliance with the law, the government can assess a deficiency against him after the expiration of 5 years, on the ground that it was *not in strict compliance with the law.* This question, it seems to me, must be answered in the negative, as it was answered by the United States Board of Tax Appeals, whose decision is reported

> in 2 B. T. A. 517. Otherwise, there would practically be no period of limitation whatsoever, and every man who made an inaccurate return could have a deficiency assessed against him at any time, because an inaccurate return is not a return made strictly in compliance with the law."

Even more closely in point, however, are the Board decisions cited above. It will be recalled that Sec. 239 was mandatory in its requirement that the return—

> "shall be sworn to by the president * * * and by the treasurer or assistant treasurer"

but was much less definite in its requirement as to the information to be furnished. There was no mandatory "shall" but merely an interpolated phrase qualifying the term "return" in these words—

> "stating specifically the items of its gross income and the deductions and credits allowed by this title."

Incidentally there was no definite requirement as to whether gross income or deductions should be itemized in one or two or three general classifications or in ten or twenty or thirty detailed classifications, that being all left to the Commissioner's discretion in preparing the return. The mere fact that he did not have time before March 15 to decide just how many classifications he desired and to publish and distribute forms is no reason why the statutory limitation should be extended for *more than five years* after the date on which he required a return and payment of the first installment. Congress clearly enacted that the date for filing the return and payment of the installment should be the same, and that if one was extended the

other should likewise be extended. Revenue Act of 1918, Sec. 250(a).

In *Stetson v. Ellison,* 11 B. T. A. 397, the question was whether the statute started to run on the filing of a consolidated return by another corporation with which petitioner was not in fact consolidated or upon the date when petitioner subsequently filed a separate and correct return. After findings as a fact with respect to the original consolidated return that—

> "Although the gross income, deductions and credits of the petitioner were included in the totals consolidated in the return, its figures, like those of the other affiliated companies, could not be separately identified from the face of the return."

the Board nevertheless held that that return was *the return* which started the running of the statute. After considering the matter at length for several pages the Board said at page 403—

> "Where a consolidated return has been prepared and filed in good faith, and the names of the companies included in the consolidation are made clear to the respondent, and all of the 'items of gross income and the deductions' are included therein, although said items of income and deductions may not be in sufficient detail to enable the respondent to accurately compute the tax against each of the companies, there is a 'substantial' compliance with the statute."

To the same effect see the other cases cited above, and particularly the following language in the Board's opinion in *Colmer-Green Lumber Co.,* 12 B. T. A. 256, at page 262 (italicizing supplied)—

"The schedules showing the balance sheet and analysis of surplus attached to the return filed on May 15, 1920, show separately assets and liabilities of each of the corporations for which the consolidated return was being made, *but did not show separately the items of income and deductions applicable to each.*

Was that return the return required by statute for the purpose of starting the running of the period of limitations? The respondent contends that it was not, since it was a consolidated return which did not show separately the items of income and deductions and the information required by the printed instructions appearing on the return and that a consolidated return was not required by statute for the two corporations.

* * * * * * * * *

The return indicated on its face that more than 50 per cent of the voting capital stock of two corporations was owned or controlled by the same interests. In view of the regulations and rulings of the Treasury Department with respect to consolidated returns and the uncertainty as to a definite basis for such returns, and the fact that the respondent raises no question as to the petitioner's good faith in filing a consolidated return, *we think that such return was filed in good faith.*

On the return appear the names of the two corporations with their respective addresses, and a statement that it is a consolidated return. Although the items of income and deductions for the respective companies were not segregated as to each company, all items of income and deductions were included in the returns. *We think that the consolidated return under the facts and circumstances was sufficient to start the running of the period of limitations.* The statute does not require that such a return include the separate income and deductions of each corporation. The regulations of the Commissioner, approved by the

Secretary, however, do provide that statements and schedules shall be filed giving details of the items of gross income and deductions. Whether the regulations were complied with, the Commissioner had the opportunity to determine. The respondent had an opportunity to audit the return and to determine whether it set forth the data and information in sufficient detail and to determine whether a consolidated or separate return should have been filed, as he subsequently did. *The period of limitation prescribed by statute is one of repose and it should not lightly be construed to permit the respondent to reopen cases upon the ground that the return filed in good faith was not the return required by statute.* We held in the *Stetson & Ellison case, supra,* that under a similar state of facts the consolidated return was sufficient to start the running of the period of limitation."

Cf. also the provisions of Art. 52 of Regulations 45 which read—

"In view of the unusual conditions prevailing at the close of the year 1918 it is recognized that many *items of gross income,* such as claims for compensation under cancelled contracts, together with claims against contracting departments of the Government for amortization and other matters, while properly constituting gross income for the taxable year 1918 were undecided and not sufficiently definite in amount to be reported in the original return for that year. In every such case the taxpayer should attach to his return a full statement of such pending claims and other matters, and when the correct amount of such items is ascertained an amended return for the taxable year 1919 should be filed."

and of Art. 407 of the same regulations that—

> "In lack of a prescribed form a statement made by a taxpayer disclosing his gross income and the deductions therefrom may be accepted as a tentative return, and if filed within the prescribed time a return so made will relieve the taxpayer from liability to penalties, provided that without unnecessary delay such a tentative return is replaced by a return made on the proper form."

both of which relate to this same year 1918 and contemplate that "*items* of its gross income" (quoted from Sec. 329) may be temporarily omitted from *the return.*

It is thus apparent that such "substantial compliance" with that section as is convenient under all the circumstances has long been considered by both the Board and the Treasury Department in the executive department of the Government, as well as by the courts, as sufficient to constitute a return. And especially should this be true where it was the *Government's own convenience* which dictated both the abbreviated form of 1031-T and the requirement that neither the date for filing of returns *nor that for payment of the first installment* should be extended.

We submit therefore that Sec. 239 does not in the least militate against the position taken in Point I, and we pass to the consideration of the other question presented by this case, viz., the effect to be accorded the written waiver or consent. The Court will note of course that if it holds with us under Point I that the additional period for assessment expired on March 15, 1925, and that the assessment was accordingly barred, it may reverse the judgment below on that ground without passing on any further questions.

IV. The additional taxes here in question were illegally collected for the further reason that they were not collected within the period for collection provided by the consent in writing or by law.

The taxes here in question were collected in several installments, the first of which was not paid until August 31, 1925 (R. 17). Even if the Government were correct in its contention that the original five year period for assessment and collection did not start until June 16, 1919 (R. 15), and hence continued until June 16, 1924, the collection beginning on August 31, 1925, would still have been barred. On March 1, 1924, both the Commissioner and the taxpayer had consented in writing to the assessment or collection of these taxes within a period of one year after the expiration of the statutory period of limitation (R. 15). The period of limitation, however, at the very latest expired on June 16, 1924, and the additional year by virtue of the consent did not permit collection subsequent to June 16, 1925. The petitioner therefore submits that in any event the collection on various dates beginning August 31, 1925, was erroneous and illegal, and that the judgment below should be reversed for this further reason.

Again we turn to the pertinent provisions of the statutes and find that Sec. 250 (d) of the Revenue Act of 1918 (40 Stat. 1083) provided:

> "No suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the return was due or made."

and Sec. 250 (d) of the Revenue Act of 1921 (42 Stat. 265) provided:

"The amount of income, excess-profits, or war-profits taxes due under any return made * * * under prior income, excess-profits, or war profits tax Acts * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due * * * under prior income, excess-profits or war-profits tax Acts * * * shall be begun after the expiration of five years after the date when such return was filed."

The Revenue Act of 1924 became law on June 2, 1924. Sec. 277 of that act (43 Stat. 299) provided:

"(a) Except as provided in Section 278 * * *."

"(2) The amount of income, excess-profits, or war-profits taxes imposed by * * * the Revenue Act of 1918 * * * shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period."

and Sec. 278 of the same act provided:

"(c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in Section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon."

"(d) Where the assessment of the tax is made within the period prescribed in Section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax."

"(e) This section shall not (1) authorize the

assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence or (2) affect any assessment made, or distraint or proceeding in court, begun before the enactment of this Act."

From the above-quoted sections of the Revenue Acts of 1918 and 1921 it is clear that the statutory period of limitation on the collection of taxes was five years, commencing with the date upon which the return was due or made. The Revenue Act of 1924, however, introduced a radical change in this respect by providing that collection might be made at any time within a new period of six years from the date of the assessment of the tax.

Since collection of the taxes in question was not made until over a year after the expiration of five years from the date when petitioner's return was filed (whether March 15, 1919, or June 16, 1919, is taken as the starting point of the period of limitation), the sole justification for the collection of taxes must be that such collection comes within the provisions of the Revenue Act of 1924, which must to that extent necessarily be held to be retroactive. That is the contention of the Government.

The petitioner respectfully submits that this contention is not sound, because the period of limitation within which the collection of the taxes in question could be made was established not by the Revenue Acts then or thereafter in effect, but had already been established by the agreement of March 1, 1924. Petitioner further contends that this agreement of March 1, 1924, was not affected by the Revenue Act of 1924;

and lastly petitioner submits that the language of the Revenue Act of 1924 cannot be so construed as to have application to the situation in the case at bar.

Our argument on this point is thus divided as follows:

> (*1*) *The period of limitation applicable to the collection of the taxes in question was established by the agreement of March 1, 1924, between petitioner and the Commissioner of Internal Revenue.*
>
> (*2*) *The agreement of March 1, 1924, was not affected by the Revenue Act of 1924.*
>
> (*3*) *The language of the Revenue Act of 1924 cannot be construed to be applicable to the facts in the case at bar.*

And we proceed to the consideration of these points in the order named.

1. *The period of limitation applicable to the collection of the taxes in question was established by the agreement of March 1, 1924, between petitioner and the Commissioner of Internal Revenue.*

In March of 1924 the time within which the Commissioner of Internal Revenue could legally assess and collect taxes for the year 1918 had very nearly expired. At that time whether or not additional taxes for that year were due from the petitioner was undetermined, and a similar situation prevailed with a host of other taxpayers throughout the country.

It is common knowledge that in this situation the Commissioner of Internal Revenue was faced with the alternative in the case of each taxpayer of making an immediate and arbitrary assessment and collection of additional taxes for the year 1918, or of securing the

taxpayer's consent that a new period of limitation be substituted for the statutory period provided by the Revenue Act of 1921. The Commissioner therefore mailed to the petitioner (it being one of the taxpayers in this situation), the so-called "Income and Profits Tax Waiver," which in the form set forth at R. 15 was subsequently executed by ~~Respondent~~ petitioner and the Commissioner under date of March 1, 1924. It reads as follows:

> "In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, Florsheim Bros. Dry Goods Co. Ltd. of Shreveport, La., and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess profits, or war profits taxes due under any return made by or on behalf of the said Florsheim Bros. Dry Goods Co. Ltd., for the year 1918 under the Revenue Act of 1921, or under prior income, excess profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation, as extended by any waivers already on file with the Bureau, within which assessments of taxes may be made for the year or years mentioned."

The petitioner respectfully submits that from and after the effective date of this agreement the respective rights of the parties were limited by the terms of this agreement, and that nothing which has occurred sub-

sequent thereto could affect these rights in any way. By authority of the same Act which included the theretofore applicable statute of limitations, the agreement between the Commissioner and the petitioner had been substituted for the provisions of the Revenue Act in regard to the period of limitation for assessment, determination, *and collection* of taxes.

It cannot be said that this agreement was a mere extension of the statutory period. It is an agreement the terms of which were to remain in force for one year from a given date. The statutory period of limitation is mentioned in the agreement, not because it is to be extended by the agreement, but as fixing a date certain from which the one-year period during which the agreement was to be operative was to run.

We have, therefore, a definite bargain whereby the Commissioner, under the authority conferred upon him by the statute and for a valuable consideration, undertook to determine, assess, *and collect* additional taxes against the petitioner for the year 1918, within the period stipulated in the agreement, if such additional taxes were to be determined, assessed, and collected at all.

It must be conceded that the term within which the additional taxes in question could legally be assessed and collected is determined and limited either (a) by the terms of the Revenue Acts or (b) by the terms of the written agreement between the Commissioner and the petitioner.

Assuming the latter to control, the assessment might have been timely made if it could be conceded that the period of limitation commenced to run on June 16, 1919, rather than March 15, 1919; but collection was not begun until August of 1925, more than two months after

the last possible date on which collection could legally have been made under the agreement.

Assuming, however, that the agreement of March 1, 1924, is not to control, then even the assessment was not timely made, for it was not made on or before June 16, 1924, the last possible date for assessment under *any* of the Revenue Acts involved, and under a construction of the facts most favorable to the Government.

The District Court in *Hood Rubber Co. v. White,* 28 F. (2d) 54 at 55, well said—

> "The government's contention that the waiver did not limit the time of collection of the tax to six years is unsound. The government takes advantage of the six-year period for assessment, and then says that the six-year period for collection was changed by the latter statute of 1924 (26 U. S. C. A. Sec. 1061), which allowed six years after a valid assessment for collection. The government cannot have its cake and eat it too. Either the waiver conferred no power on the government to make the assessment later than the statutory period allowed, or it set up a six-year restriction on collection as well as assessment. It is distinctly unfair for the government to take advantage of one part of the waiver and refuse to be bound by the other part of it. The statement made in the government's brief and in some of the cases, that the waiver was made by the taxpayer and the Commissioner with future statutes in view, seems farfetched. A distinct limitation of six years (one year more than the period then prescribed by statute) was expressly put in the waiver, showing that the six-year period was a matter of importance to both sides. As the taxing statutes were being changed at nearly every session of Congress, the parties would undoubtedly have referred to future taxing acts had they had them in mind."

It is respectfully suggested that much of the confusion with reference to the legal effect of the so-called waivers is due to a misunderstanding as to the true legal effect of the period of limitations as applied to taxing statutes.

In a very real sense the period defined by taxing acts within which certain things must be done is not a true statute of limitations at all, as this term is usually technically defined.

To illustrate: A statute of limitations, as that term is generally used, means an enactment by a legislative body which provides the period within which legal claims may be enforced in courts. Such acts do not profess to, and of course could not change the basic rights of those to whom they are directed. If A is indebted to B in a certain sum of money, the fact that six years have elapsed without B's attempting to enforce his rights in a judicial proceeding does not in any way affect the indebtedness; it merely means that within a particular jurisdiction that right is not enforceable in the courts after the lapse of the six-year period. Furthermore, in most jurisdictions such statutes must be pleaded specially if advantage is to be taken of their provisions. They are so much outside of the issues presented to the courts for adjudication that no inquiry is ever made as to lapse of time, unless the question is raised specifically by the interested party.

But when Congress informs the taxing authorities of the terms and conditions which they must observe in levying taxes, and when among those terms and conditions there is a provision that such rights as they have must be enforced before a given date, then when this date arrives both the right and the remedy are gone. It is not a mere denial of the use of the judicial tribunal

to enforce the rights which the collector formerly had against the taxpayer; it goes to the root of the matter and says that unless the acts defined are done before a certain day all rights are gone. And this is well established by a long line of decisions of this court—

The Harrisburg, 119 U. S. 199.
Davis v. Mills, 194 U. S. 451.
Atlantic Coast Line v. Burnette, 239 U. S. 199.
Danzer v. Gulf, etc., Railroad, 268 U. S. 633.
Cf. also *Citizens Bank v. Miller*, 16 F. (2d) 163.

In *The Harrisburg* this Court said—

"This brings us to the second branch of the question, which is, whether, with the Statutes of Massachusetts and Pennsylvania above referred to in force at the time of the collision, a suit *in rem* could be maintained against the offending vessel if brought in time. About this we express no opinion, as we are entirely satisfied that this suit was begun too late. The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year; and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and

> the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right."

And so in the case at bar Congress in the Acts of 1918 and 1921 defined a five year period as the time within which the taxing authorities must exercise their rights against the taxpayer and upon the expiration of that period, the entire right of the taxing authorities to proceed was gone. In this case after June 16, 1924, no right could possibly have existed against this taxpayer under the statutes but a new right resulting from an agreement between the parties had in the meantime been created; namely, the right of the Commissioner to determine, assess and collect the tax within one year from that date; that is, before June 16, 1925, at the latest. Since this right was one given to the taxing authorities not by virtue of an act of Congress, but by the agreement of the parties, it follows that the terms and all of the terms of that agreement must be strictly complied with if the rights so given are to be exercised.

2. The agreement of March 1, 1924, was not affected by the Revenue Act of 1924.

Obviously, had there been no Revenue Act of 1924, the rights of the parties would have been governed by the terms of the consent, and the taxing authorities would have been obliged to determine, and assess, and collect within the period therein stipulated.

The Government contends, and the court below held, that the Revenue Act of 1924, enacted on June 2, 1924, so modified the terms of the consent as to allow the taxing authorities a new period of six years from the date of assessment within which to collect (*i. e.* a total

of more than twelve years from the original filing of Form 1031-T). The question therefore becomes one of statutory construction, namely: does the Revenue Act of 1924 expressly say that the Commissioner may on the one hand assess under the terms of the waiver and then on the other hand, disregarding its provisions with regard to collection, collect under the terms of the 1924 Revenue Act? It is respectfully contended that there is nothing in the Act which tends to show any intention on the part of Congress radically to so change and modify the status of the parties.

In *Chicago & Northwestern Railway v. United States*, 104 U. S. 680, the problem before this Court was practically identical with this issue in the case at bar. Briefly, the facts in that case were: Acting under authority of an Act of Congress, the Postmaster General entered into a written contract with the railroad company, whereby for four years the railroad company undertook to carry mail for the Government at the rate of a specified sum per mile. A subsequent Act of Congress provided for a reduction in the rates to be paid for carrying mail. Accordingly, the Postmaster General reduced the rates under the contract above referred to. Upon the completion of the four years of the contract the railroad brought suit against the United States to recover the difference between the contract price and the reduced rates. This Court, reversing the decision of the Court of Claims, held in favor of the railroad company.

The language of the opinion of this Court is so significant and so applicable that we quote it at length:

> "But when Congress authorized the Post Master General to fix the price by contract, within specified maximum rates, and for a period of four

years, it was an agreement on the part of the United States that the stipulated compensation should not be withheld during that period, which it could not refuse to perform without a breach of the public faith * * *.

"The power to establish the price includes the power also to declare the period of its duration; and if it be said that any contract which fixes both the price and its duration must be construed as subject to the continuous control of the power which made it, it must also be admitted that no change can be made without the abrogation of the contract. The Government, whatever power it may reserve over its own agreements, cannot impose new contracts upon those with whom it deals. It might by a repeal of the contract, expressly stipulated, rest on the previous state and claim the bare rights it had before, but it cannot do more than that. It certainly cannot retain the obligation of the contract as against the company, and at the same time vary its own, unless it has reserved the right to do so in the contract itself * * *.

"It is argued, however, on the part of the Government, that the legal effect of what was done was to abrogate the old contracts and make new ones * * *.

"In our opinion, that view cannot be maintained. The contracts of 1875 were for four years, and were expressly authorized by law. They were, therefore, valid, and binding on the United States as well as upon the Company. They contained, within themselves, a mode for lessening or, if deemed best, for discontinuing entirely, the described service; and provided for a proportionate reduction of the stipulated compensation. In no other mode could the contract be changed, except by the mutual assent of the parties. Any change attempted by either, otherwise, would have been merely a breach of the agreement; and the United

States would have been liable to damages for its breach, on the same principles and to the same extent as a private party, for which a suitable remedy was provided by law in the jurisdiction conferred upon the Court of Claims. In this respect, the relation between the parties was that of perfect equality in right.

"If, in these circumstances, the Government not merely accepted, but demanded, the performance of the contract service, the presumption is that it meant to pay this contract price. It would require positive and express words to negative that presumption. We find none such in the Statutes of 1876 and 1878. Their language may well be satisfied by confining them to cases where no time contracts for service were then in existence, and to contracts thereafter entered into. They do not legitimately apply to contracts then existing whose terms had not expired, such as those in the present case."

It is submitted that the situation discussed in this case is parallel to the situation in the case at bar. The petitioner and the Commissioner entered into an agreement, each one giving up a right in exchange for the agreement of the other. The agreement was one which the Commissioner was expressly authorized to make, and the terms as to its duration were explicit. Therefore, unless there is in the Revenue Act of 1924 an express repeal or abrogation of this contract, this subsequent Act of Congress cannot impose a new contract on the petitioner, and the Government cannot retain the obligation of the contract, so far as the petitioner is concerned, and at the same time vary the terms of the Commissioner's obligation. Nothing in the Revenue Act of 1924 can be pointed out which even hints that such a drastic measure was intended.

This precise question was passed on by the District Court in *Hood Rubber Co. v. White,* 28 F. (2d) 54, where it was held that Congress had no power to alter the agreement between the parties contained in the waiver. At p. 56 that court says:

> "The Government also contends that Congress had the power to change the time for collection set up by the waiver without thereby infringing any of the plaintiff's constitutional rights. This argument is unsound. It was to the advantage of both parties that the period of limitation should be extended and it was of special advantage to the plaintiff that it should know when the taxes might be considered as unenforceable, so that it might properly arrange its financial affairs. This seems to be clearly a case of a binding contract, which cannot be varied by subsequent legislation. C. & N. W. Ry. Co. v. United States, 104 U. S. 680, 26 L. Ed. 891."

Whether or not Congress had the power to abrogate the agreement between the parties, there certainly is nothing in the Revenue Act of 1924 which clearly shows its intention so to do, and hence the agreement between the parties stands unaffected by said Act.

3. The language of the Revenue Act of 1924 cannot be construed to be applicable to the facts in the case at bar.

We have shown that the rights of the parties were fixed and definite prior to the passage of the Revenue Act of 1924, the effective date of which was June 2, 1924. It follows, therefore, that so far as the parties to this action are concerned, if the Revenue Act of 1924 is to be held to affect their rights, said

statute must be given a retroactive construction.

It is established law that a statute will not be given a retroactive effect unless there is explicit language requiring it, or unless such effect must necessarily be implied from the context of the statute in question. See *Murray v. Gibson*, 15 How. 421.

This principle of statutory construction has been applied to the Internal Revenue Laws. See *Schwab v. Doyle*, 258 U. S. 529; *United States v. Cabot*, 5 Am. Fed. Tax Rep. 6172.

This principle has been clearly and succinctly stated in the case of *United States v. Magnolia Petroleum Co.*, 276 U. S. 160, in the following language:

> "Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears."

As having a bearing on the legislative purpose behind the Revenue Act of 1924, it is significant that in section 277 of that act a separate sub-section is used to indicate the statutory period of limitation for taxes imposed by the 1921 and 1924 acts on the one hand, and by prior acts on the other. But in section 278(c), in regard to agreements between the Commissioner and the taxpayer (being the only section in the 1924 act which refers to such agreements), assessment only is mentioned, nothing being said of collection; and reference is not made to any particular act. But under the Revenue Act of 1921, which was not repealed in this particular by the 1924 act, the provision in regard to such an agreement expressly and conjunctively refers to determination *and* assessment *and* collection. See *United States v. Field*, 255 U. S. 257,

for the rule of statutory construction in respect to words conjunctively used in a statute.

It is submitted that the inference from this is irresistible that Congress intended the Act of 1924 to be a point of departure from the earlier laws, leaving whatever existed under these earlier laws to be worked out in accordance with their provisions, and framing a new act for the future. It follows under this view that nothing in the 1924 act was intended to affect the rights of taxpayers as they existed at the time the act was passed, and that the assessment of the additional taxes in question, even though made after the enactment of the 1924 act, was made under the terms of the agreement between the petitioner and the Commissioner, and not under the terms of the new tax law.

Referring now to the language of the pertinent provisions of the 1924 Act, if it was the intention of Congress to make the provisions of that act apply to the assessment and collection of taxes due under prior Revenue Acts, such intention must be found to be expressly declared, or necessarily implied, if at all, by the first clause of section 277(a) which introduces the provisions as to the limitation on the assessment and collection of taxes due under prior Revenue Acts, and which reads as follows:

> "Except as provided in Sec. 278."

taken together with section 278, subsections (d) and (e), which read as follows:

> "(d) Where the assessment of the tax is made within the period prescribed in Section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax.

"(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint, or by a proceeding in the court if at the time of the enactment of this Act such assessment distraint, or proceeding was barred by the period of limitation then in existence or (2) affect any assessment made, or distraint or proceeding in court, begun before the enactment of this Act."

These very sections were under consideration in the case of *United States v. Whyel,* 19 Fed. (2d) 260 (in the District Court), and 28 Fed. (2d) 30 (in the Circuit Court), and the opinion of the court in that case held that Congress did not intend that a retroactive effect be given to, or implied by, the language of these sections.

The opinion of Judge Thompson in the decision of that case before the District Court (p. 263) states:

"The question as to whether Section 278 (e) (1) and (2) was intended to relate to the future only, or was to be given a retroactive effect, is conclusively settled by the proceedings before the committee of finance of the Senate, which had under consideration the Revenue Act of 1924. A. W. Gregg, appearing as a special assistant to the Secretary of the Treasury, referring to the section, which had just been read, said: 'That is to keep this section from having any retroactive effect, or to apply to things happening before its passage.'

"Again, when the section was under consideration, Mr. Gregg said: 'That is to prevent the giving of any retroactive effect to the provisions of this Act. The taxes under prior Acts stand on their own footing, and this applies only after the passage of this Act.' "

The conclusion reached in that case was later confirmed by this Court in *Russell v. United States,* 278 U. S. 181, where the vital question upon which the decision of the case rested was whether or not section 278 of the 1924 act should be given a retroactive construction. This Court said:

> "No plain purpose to change the status of the claim against the petitioners as it existed just before June 2, 1924, can be spelled out of the words in Sec. 278, or otherwhere."

In the case at bar the court below proceeded on what we believe we have shown to have been an utterly erroneous theory that the effect of the consent is to extend the statutory period of limitations, and having been so extended, the provisions of the Revenue Act of 1924 become operative. To a like effect is the case of *Aiken vs. The Commissioner* recently decided by the Circuit Court of Appeals for the Eighth Circuit and not yet reported. But if our position is sound that once the period of limitations created by the statute had expired and the rights of the parties thereunder were gone, it of necessity follows that neither by agreement nor by any other means could the statutory period itself be enlarged or extended. Moreover, these cases seem inconsistent with the decision of this Court in *Russell v. United States, supra.,* the purport of which was that the status of the claim against the taxpayer as it existed just before June 2, 1924, was not in any wise altered by the Revenue Act of 1924.

It is clear that, although the actual assessment of the additional taxes in the case at bar was not made prior to June 2, 1924, the facts of this case are en-

tirely analogous to the facts in the case of *Russell v. United States* and other cases cited above, because in lieu of such assessment, the time for which had nearly expired, the Commissioner entered into the agreement of March 1, 1924, with the petitioner.

Should this taxpayer who, several months prior to the passage of the Revenue Act of 1924, granted to the Commissioner further time within which to enforce possible rights against him, be in a less favorable situation than the taxpayer who stood on his strict legal rights and thereby forced the Commissioner to act immediately, if he were to act at all? To reach such a result the language of Congress must be compelling, which is not the case with any of the pertinent provisions of the Revenue Act of 1924.

Summarizing, the petitioner respectfully submits that the period of time within which the additional taxes in question could legally have been collected was defined by agreement between it and the Commissioner of Internal Revenue, and that the terms of this agreement were not modified by the Revenue Act of 1924. It is further contended that, if this agreement is held not to establish the period of limitation for collection of these taxes, then the statutory period of limitation provided by the Revenue Act of 1921 must govern, there being no basis to be derived from the language of subsequent Revenue Acts or from the decisions of the courts interpreting such acts for holding that such Revenue Acts should be given retroactive effect. The additional taxes in question not having been collected either within the period of limitation provided in the agreement or within the statutory period provided by the Revenue Act of 1921, their subsequent collection was illegal.

V. Conclusion.

In conclusion, our position may be summarized as follows:

1. The additional taxes involved in this case were illegally collected, because they were not assessed within the period of time provided by agreement or by law for their assessment.
2. The additional taxes involved in this case were illegally collected, because they were not collected within the period of time provided by agreement or by law for their collection.

Having been illegally collected, the additional taxes in question must be repaid to the petitioner, with interest from the date of payment, and the judgment of the United States Circuit Court of Appeals for the Fifth Circuit should be therefore reversed with directions to enter judgment for petitioner.

Respectfully submitted,

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James Craig Peacock,
Counsel for Petitioner.

December, 1929.

APPENDIX A.

BRANDON CORPORATION V. JONES, COLLECTOR OF INTERNAL REVENUE

33 F. (2d) 969.

ERNEST F. COCHRAN, District Judge. Woodruff Cotton Mills (hereinafter called "the taxpayer") paid under protest to the collector income taxes which had been assessed against it amounting to $52,686.73. The taxpayer and certain other mills were consolidated into Brandon Corporation, the plaintiff, and all choses in action and property of every kind of the taxpayer became vested in the plaintiff. The plaintiff brought suit to recover the taxes in question, and amended its complaint so as to present all the facts fully, and the defendant has interposed a demurrer. It is conceded that if the demurrer is sustained, the plaintiff cannot amend further, and the complaint in that event must be dismissed. It is also conceded that if the demurrer is not sustained, the defendant has no answer to the facts and that a judgment for the plaintiff must be entered upon the pleadings, together with a certificate of probable cause for the acts of the collector pursuant to the statute.

The parties also concede that there is but a single question of law presented, and that is whether Form 1031-T, filed by the taxpayer on March 14, 1919, styled the tentative return, or Form 1120, filed June 16, 1919, styled the completed return, was the return, the filing of which started the running of the five-year statutory period of limitation on assessment and collection of additional taxes for the year 1918 (Revenue Act 1921, § 250(d), 42 Stat. 265).

The Revenue Act for 1918 was enacted on February 24, 1919 (40 Stat. 1057). Under the act, returns were

to be filed by March 15, 1919, and the tax paid in quarterly installments on March 15, June 15, September 15, and December 15, 1919. The law also provided that in case an extension of time for filing the return was granted, the date for payment of the first installment should be correspondingly extended. It was evident that many taxpayers would be unable to prepare their returns by March 15. The requirements of the government, however, were such that it was advisable that the first installment should be paid by that time. In order to meet this situation, the Commissioner of Internal Revenue issued two rulings, one on February 13, 1919, and the other on February 27, 1919. In the first ruling, it was stated that no general extension of time would be authorized, but that the Commissioner had approved a novel feature of tax collection which would serve for all practical purposes as a possible extension of 45 days for the filing of the return, where the parties were unable to complete and file their return by March 15. He also announced in that ruling that if a corporation finds it impossible to complete its return in time, it might make a return of the estimated tax due and make payment thereof not later than March 15; and if a meritorious reason was shown why the corporation was unable to complete its return, the collector would accept the payment of the estimated tax and agree to accept a revised and completed tax return within a period of not more than 45 days. The ruling of February 27, 1919, contains the following pertinent clauses:

> "Income taxpayers both corporation and individual, were today granted by the Internal Revenue Bureau further relief with respect to the filing of their completed tax returns for 1918. The statement that the taxpayer is unable by March

15, to execute and file the complete return will be accepted, under the new procedure, as sufficient reason for extending for forty-five days the time for filing complete income and excess profits returns, provided in every case the taxpayer pays on or before March 15, at least 25 per cent of the estimated amount of the tax due.

"A supply of blanks of Form 1040-T, for the use of individuals as tentative return on the estimated tax basis, were shipped to each collector of Internal Revenue today. Collectors will furnish this Form to any individual requesting an extension of time for the filing of his complete return for 1918.

"The tentative return to be used by corporations who make payment of the estimated tax due on or before March 15 is being printed, and a supply will be forwarded tomorrow to each collector, who will mail these Forms to every corporation on his list. (To be known as Form 1031-T.)

"Under the estimated tax procedure which is now available to every taxpayer under the Income and Excess Profits Section of the new Revenue Law, there no extension beyond the legal due date, March 15, for the payment of the taxes then falling due.

"It is urged by the Bureau that the estimates be computed on the most exact basis available. Should the first payment to be made on or before March 15, under this plan, be greater than the amount eventually found to have been due upon examination of the completed return the excess payment will be automatically credited against the next installment, which will be due June 15.

"The taxpayer will not be relieved, however, under this plan, of the interest due upon any amount by which his payment on March 15 may fall short of the amount found to have been due upon examination of the completed return."

Pursuant to these rulings, the taxpayer on March 14, 1919, filed its tentative return on Form 1031-T, together with a statement of the estimated amount of the tax accompanied by a remittance of one-fourth thereof. This form contains the statement that the form and remittance covering one-fourth of the estimated tax must reach the collector's office on or before March 15, 1919. On the duplicate, under the head of "Penalties," it is stated that there is a penalty of $1,000 for failure to make return on time. On June 16, 1919, the completed return was filed.

The government contends that inasmuch as the tentative return did not contain the information which the law provides the return shall contain, it cannot be deemed the return required by law, and amounts to nothing more than an agreement for an extension of time; and therefore the completed return must be deemed the return from the filing of which the statute begins to run. The taxpayer, however, contends that even conceding that the tentative return does not contain all of the information required by law, nevertheless it was a return for several purposes, and must therefore be deemed the return from the filing of which the statute starts to run. I am in accord with the contention of the taxpayer. The tentative return certainly cannot be construed to be merely an agreement for extension of time, and to constitute no return in any aspect. The Commissioner in his ruling of February 13, 1919, called it a "return," and in the ruling of February 27, 1919, a "tentative return." In Form 1031-T itself, it is called a tentative return. There was certainly some reason for insisting that the paper be styled a tentative return. If it was not a return at all, but merely an agreement for an extension of time, the taxpayer was not bound to pay

the first installment of his taxes until he filed the completed return. It is clear, therefore, that the filing of Form 1031-T constituted such a return as to prevent the extension of time for payment of the first installment which the statute provided in all cases of an extension of time for the filing of a return. See sections 227(a) and 241(a) of the Revenue Act of 1918 (40 Stat. 1075, 1082), and section 250(a) of the same act (40 Stat. 1082).

It is common knowledge that the Revenue Act of 1918 constituted the greatest single levy of any tax in the history of the country, and that the financial condition of the government was such that it could not permit any extension of time for the collection of the first installment. It was for its own benefit largely that the government devised the plan of tentative returns. This procedure established by the Commissioner of Internal Revenue under the rulings of February 13, 1919, and February 27, 1919, expressly required therefore the filing of a return on March 15, 1919, and expressly provided that there was no extension beyond that date of the time for the payment of the first installment. The Commissioner therefore elected not to grant any extension of time for filing these returns, and it necessarily follows that the return which he then required must be deemed the return contemplated by the statute whether termed merely a tentative return or not.

But the tentative return was sufficient to constitute a return in another aspect. Section 250(e) of the same act (40 Stat. 1083) provides that if any tax remains unpaid after it is due and for 10 days after notice and demand, there should be added a penalty. Notice and demand were a condition prerequisite to the collection of the tax; but the same section provided that in the

case of the first installment, the instructions printed on the return should be deemed sufficient notice of the date when the tax is due, and sufficient demand. Form 1031-T contained instructions complying therewith, and was a sufficient notice and demand to make the first installment payable on March 15, 1919.

Moreover, the Commissioner of Internal Revenue has always considered that assessments may be properly made on such tentative returns. For examples of assessments thus made, see Matteawan Mfg. Co. v. Commissioner of Internal Revenue, 14 B. T. A. 789, and Arthur H. Lamborn et al., v. Commissioner of Internal Revenue, 13 B. T. A. 177.

Again, Form 1031-T contained an explicit statement of the penalty that would attach in case of failure to make return. The filing of this form prevented the attaching of the penalty. It must therefore be deemed a sufficient return so far as the imposition of this penalty is concerned. It is clearly therefore a return for that purpose.

There are other purposes for which the tentative return is treated as a return, but it is unnecessary to pursue the discussion further on that line.

The law clearly contemplates, so far as the starting of the statute of limitations is concerned, but one return. That return may not be complete in all particulars. It may be the subject of amendment; but if it is presented bona fide, and is a return for any purpose under the statute, then it must be a sufficient return to start the running of the statute. The government cannot blow hot and cold. It cannot say to the taxpayer, "File a paper which we know to be incomplete and does not give all the information required by law, and pay us the first installment and we will allow you later to complete your return, and readjust the amount of taxes in accordance with the completed re-

turn," and then say later that, "the first paper which you filed was no return and the statute must start from the date of the final completed return." It cannot say, when its interests require it to do so, that the tentative return is a return, and then, when its interests require the contrary, say that it is no return.

It is argued, however, that the Board of Tax Appeals has consistently held that the statute does not begin to run from the date of the filing of the tentative return, but from that of the completed return. Appeal of Dallas Brass & Copper Co., 3 B. T. A. 856, 864; Appeal of Boston Hide & Leather Co., 5 B. T. A. 617; S. Walter Kaufman v. Commissioner of Internal Revenue, 14 B. T. A. 602; Reliance Mfg. Co. v. Commissioner of Internal Revenue, 7 B. T. A. 583.

The rulings of the Board are entitled, of course, to great respect, but I am not bound by them. I have read them carefully and considered the reasoning of the Board in reaching their conclusion. But that reasoning does not seem to me convincing. It proceeds wholly upon the theory that because the tentative return does not contain the information it should contain, it must therefore be disregarded *as a return* and treated "only as a request for an extension of time." It ignores entirely the fact that the tentative return is effective as a return for certain purposes. These cases do not advert to the arguments that have been made before me that the tentative return must be deemed, and has been treated by the Board, as a return for some purposes.

My attention has also been called to the case of Florsheim Bros. Dry Goods Co. v. U. S., 29 F. (2d) 895, by the Circuit Court of Appeals, Fifth Circuit, which holds that the statutory period begins to run from the completed and not from the tentative return,

This is indeed high authority, and I should hesitate ordinarily not to follow it. But it does not appear that in that case the points that have been presented in this case were presented to the court. There is certainly no suggestion in the opinion that the court considered these points. All that is said in that case is as follows: "It is suggested in argument that the statutory period of limitations began to run from the date of the tentative return in March of 1919; but we are of the opinion that the return meant by the statute was the final or completed return."

I cannot but feel that if the attention of that court had been called specifically to the various cases in which the tentative return is deemed a return under the statute, the decision would have been otherwise. Although such high authority, as it is not from my own circuit, I do not feel I am absolutely bound to follow it, when my own views lead so strongly to a contrary conclusion. I am the more constrained to follow my own views, as this case will undoubtedly be appealed by one party or the other, whatever my decision may be; and as it will go up upon the pleadings, it is of no great moment which party shall carry the burden of the appeal.

It must be borne in mind also that if there is any room for doubt as to the construction or application of these taxing statutes, such doubt is to be resolved in favor of the taxpayer. Gould v. Gould, 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211; Bowers, Collector, v. New York & Albany Lighterage Co., 273 U. S. 346, 350, 47 S. Ct. 389, 71 L. Ed. 676.

For these reasons, an order overruling the demurrer will be entered, and the plaintiff may apply upon four days' notice for judgment upon the pleadings and a certificate of probable cause.

APPENDIX B.

WHITE, COLLECTOR OF INTERNAL REVENUE V. HOOD RUBBER CO.

33 F. (2d) 739.

Before BINGHAM, Circuit Judge, and MORRIS and BREWSTER, District Judges.

BINGHAM, Circuit Judge. This is a suit brought by the Hood Rubber Company, appellee, in the federal District Court for Massachusetts, to recover $39,043.99, the amount of an additional income and excess profits tax for the year 1918, which was collected by distraint on December 15, 1926. By stipulation in writing the case was tried before the court without a jury.

The plaintiff, appellee, on March 14, 1919, filed its income and excess profits tax return for the calendar year 1918, in which it estimated its tax at $300,000. This return was made on a form prescribed and furnished by the Treasury Department, known as "Form 1031-T" and designated as a "tentative return." At the time of filing this return the plaintiff paid one-quarter ($75,000) of the tax as shown by its return. And June 16, 1919, upon the demand of the collector, it paid as a second installment of the tax the further sum of $75,000. July 14, 1919, the plaintiff filed a complete, revised, or amended return, showing its total tax for the calendar year 1918 to be $169,772.65, and on December 12, 1919, paid the balance of the tax, $19,772.65, as shown by this completed or amended return. January 26, 1924, while the Revenue Act of 1921 was in force, the plaintiff and the Commissioner of Internal Revenue entered into a written agreement, authorized by section 250 (d) of the Revenue Act of 1921 (42 Stat 264), extending the statutory period of limitation (five years) an additional period of one year,

in which to determine, assess, and collect the amount of income and excess profits taxes due under any return made by the plaintiff for the year 1918 under the Revenue Act of 1921, or under prior income and excess profits acts.

Thereafter the Commissioner determined that an additional tax for the year 1918 was due, and on March 18, 1925, after the Revenue Act of 1924 was enacted (43 Stat. 253), assessed an additional tax against the plaintiff, which amounted to $39,043.99, after making certain deductions and allowance of credits. On December 15, 1926, a collection of this tax was had by distraint. A claim for refund was duly filed and rejected, and on January 12, 1928, this suit was brought.

In the District Court it was held that, if the word "return," as used in section 250 (d) of the act of 1921, meant the tentative return, the government did not assess the tax in time; but, if it meant the return of July 14, 1919, the assessment was made within the required five years plus the additional year provided for in the waiver agreement. It said, however, that the question need not be decided, for if it be granted that the completed or amended return fixed the time from which to reckon, and the assessment was seasonably made, the tax was not collected either within five or within six years from the filing of the completed return; that the government, having taken advantage of the six-year period for assessment, could not say that the six-year period for collection was changed by the subsequent act of 1924, which allowed six years after the assessment for collection; that either the agreement of waiver conferred no power on the government to make the assessment later than the statutory period allowed (five years), or the agreement applied to the

time fixed for the collection as well as the assessment; that it was to the advantage of both parties that the period of limitation should be extended—of advantage to the government for the reason that, at the time the agreement of waiver was made, the statutory limitation of five years had nearly expired, and of advantage to the plaintiff to know when the tax would become unenforceable, so that it might properly arrange its financial affairs. And, such being the case, the agreement of waiver constituted a binding contract, which Congress did not intend to have affected by the provisions of the act of 1924. Chicago & N. W. R. Co. v. United States, 104 U. S. 680, 26 L. Ed. 891. Having reached this conclusion, the court entered judgment for the plaintiff in the sum of $39,043.99, with interest amounting to $4,568.15, and cost of suit. It is from this judgment that this appeal is taken.

For reasons that will later appear, we do not find it necessary to consider whether the ground upon which the court below reached its conclusion was right or not.

The first question presented is whether the return filed March 14, 1919, is the one from which the five-year period of limitation (fixed by the Revenue Acts of 1918 and 1921 [40 Stat. 1057; 42 Stat. 227]), as extended by the waiver agreement of January 26, 1924, for one year, under the authority of the act of 1921, or whether the revised or amended return is the one from which the period of limitation is to be reckoned; for, if the former is the one, the additional tax of March 18, 1925, was not seasonably assessed.

There are apparently three cases in which this question has been under consideration in the federal courts. Florsheim Bros. Dry Goods Co., Limited, v. United

States, 29 F. (2d) 895, 896 (5th Cir. Ct. of App.), decided December 19, 1928; Rasmussen v. Brownfield-Canty Carpet Co., 31 F. (2d) 89, 91 (9th Cir. Ct. of App.), decided February 11, 1929, and Brandon Corp. v. Jones, Collector, 33 F. (2d), 969, decided March 30, 1929 (Eastern Dist. of So. Car.).

In the first case no discussion of the question was had. All that was said concerning the matter was: "It is suggested in argument that the statutory period of limitations began to run from the date of the tentative return in March of 1919; but we are of opinion that the return meant by the statute was the final or completed return."

In the second case Judge Gilbert pointed out that the Board of Tax Appeals had entertained contrary views, and he took the position that the original or tentative return, and not the completed or amended one, fixed the date for the beginning of the running of the statutes of limitation as outlined in section 250(d) of the act of 1921; but his associates refrained from expressing an opinion upon the question, as the distraint proceedings there in question were barred, whether the period of limitation began to run from the filing of the tentative return or of the completed or amended one.

In the third case the facts and circumstances attending the filing of the so-called tentative return (Form 1031-T, prescribed by the Commissioner of Internal Revenue) were presented and considered, and it was held that the period of limitation began to run from the filing of the original or tentative return (and not from the filing of the completed or amended return. It was there said:

"The Revenue Act for 1918 was enacted on February 24, 1919. Under the act, returns were to be filed by March 15, 1919, and the tax paid in quarterly instalments on March 15, June 15, September 15, and December 15, 1919. The law also provided that in case an extension of time for filing the return was granted, the date for payment of the first installment should be correspondingly extended [section 250 (a)]. It was evident that many taxpayers would be unable to prepare their returns by March 15. The requirements of the government, however, were such that it was advisable that the first installment should be paid by him by that time. In order to meet this situation, the Commissioner of Internal Revenue issued two rulings, one on February 13, 1919, and the other on February 27, 1919. In the first ruling, it was stated that no general extension of time would be authorized, but that the Commissioner had approved a novel feature of tax collection which would serve for all practical purposes as a possible extension of 45 days for the filing of the return, where the parties were unable to complete and file their returns by March 15. * * * He also announced in that ruling that if a corporation finds it impossible to complete its return in time, it might make a return of the estimated tax due and make payment thereof not later than March 15; and if a meritorious reason was shown why the corporation was unable to complete its return, the collector would accept the payment of the estimated tax and agree to accept a revised and completed tax return within a period of not more than forty-five days. The ruling of February 27, 1919, contains the following pertinent clauses:

" 'Income tax payers, both corporation and individual, were to-day granted by the Internal Revenue Bureau further relief with respect to the filing of their completed tax return for 1918. The statement that the taxpayer is unable by March

15, to execute and file the complete return will be accepted, under the new procedure, as sufficient reason for extending for 45 days the time for filing complete income and excess profits returns, provided in every case the taxpayer pays on or before March 15, at least 25% of the estimated amount of the tax due.

" 'A supply of blanks of Form 1040-T, for the use of individuals as tentative return on the estimated tax basis, were shipped to each collector of internal revenue to-day. Collectors will furnish this form to any individual requesting an extension of time for the filing this complete return for 1918.

" 'The tentative return to be used by corporations who make payment of the estimated tax due on or before March 15 is being printed, and a supply will be forwarded tomorrow to each collector, who will mail these forms to every corporation on his list. (To be known as Form 1031-T.)

" 'Under the estimated tax procedure, which is now available to every taxpayer under the income and excess profits section of the new Revenue Law [40 Stat. 1057], there is no extension beyond the legal due date, March 15, for the payment of the taxes then falling due.

" 'It is urged by the Bureau that the estimates be computed on the most exact basis available. Should the first payment to be made on or before March 15, under this plan, be greater than the amount eventually found to have been due upon examination of the completed return the excess payment will be automatically credited against the next installment, which will be due June 15.

" 'The taxpayer will not be relieved, however, under this plan, of the interest due upon any amount by which his payment on March 15 may fall short of the amount found to have been due upon examination of the completed return.' * * *

"Pursuant to these rulings, the taxpayer on

> March 14, 1919, filed its tentative return on Form 1031-T together with a statement of the estimated amount of the tax accompanied by a remittance of one-fourth thereof. This form contains the statement that the form and remittance covering one-fourth of the estimated tax must reach the collector's office on or before March 15, 1919. On the duplicate under the head of 'Penalties' it is stated that there is a penalty of $1000 for failure to make return on time. On June 16, 1919, the completed return was filed."

After stating the respective contentions of the parties—that of the government, that the tentative return did not contain the information which the law required and amounted to nothing more than an agreement for an extention of time; and that of the taxpayer, that conceding that the tentative return did not contain all the information required by law, nevertheless it was a return for several purposes and must therefore be deemed a return from the filing of which the statute starts to run—the opinion continues.

> "The tentative return certainly cannot be construed to be merely an agreement for extension of time, and to constitute no return in any aspect. The Commissioner in his ruling of February 13, 1919, called it a 'return' and in the ruling of February 27, 1919, a 'tentative return.' In Form 1031-T itself, it is called a tentative return. There was certainly some reason for insisting that the paper be styled a tentative return. If it was not a return at all, but merely an agreement for an extension of time, the taxpayer was not bound to pay the first installment of his taxes until he filed the completed return. It is clear, therefore, that the filing of Form 1031-T constituted such a return as to prevent the extension of time for payment of the first

installment which the statute provided in all cases of an extension of time for the filing of a return. See sections 227(a) and 241(a) of the Revenue Act of 1918 (40 Stat. 1075, 1082), and section 250(a) of the same act (40 Stat. 1082).

"It is common knowledge that the Revenue Act of 1918 constituted the greatest single levy of any tax in the history of the country, and that the financial condition of the government was such that it could not permit any extension of time for the collection of the first installment. It was for its own benefit largely that the government devised the plan of tentative returns. This procedure established by the Commissioner of Internal Revenue under the Rulings of February 13, 1919, and February 27, 1919, expressly required therefore the filing of a return on March 15, 1919, and expressly provided that there was no extension beyond that date of the time for the payment of the first installment. The Commissioner therefore elected not to grant any extension of time for filing these returns, and it necessarily follows that the return which he then required, must be deemed the return contemplated by the statute whether termed merely a tentative return or not.

"But the tentative return was sufficient to constitute a return in another aspect. Section 250(e) of the same act (40 Stat. 1083) provides that if any tax remains unpaid after it is due and for 10 days after notice and demand, there should be added a penalty. Notice and demand were a condition prerequisite to the collection of the tax; but the same section provided that in the case of the first installment, the instructions printed on the return should be deemed sufficient notice of the date when the tax is due, and sufficient demand. Form 1031-T contained instructions complying therewith, and was a sufficient notice and demand to make the first installment payable on March 15, 1919. * * *

"Again, Form 1031-T contained an explicit

statement of the penalty that would attach in case of failure to make return. The filing of this form prevented the attaching of the penalty. It must, therefore, be deemed a sufficient return so far as the imposition of this penalty is concerned. It is clearly therefore a return for that purpose. * * *

"The law clearly contemplates, so far as the starting of the statute of limitation is concerned, but one return. That return may not be complete in all particulars. It may be the subject of amendment; but if it is presented bona fide, and is a return for any purpose under the statute, then it must be a sufficient return to start the running of the statute. The government cannot blow hot and cold. It cannot say to the taxpayer, 'File a paper which we know to be incomplete and does not give all the information required by law, and pay us the first installment and we will allow you later to complete your returns, and readjust the amount of taxes in accordance with the completed return,' and then say later, that 'the first paper which you filed was no return and the statute must start from the date of the final completed return.' It cannot say, when its interests require it to do so, that the tentative return is a return and then when its interests require the contrary, say that it is no return."

There are also decisions involving questions of like import, where the original return was incomplete in certain respects, and it was held that the supplemental return operated as an amendment of and related back to the original return, which fixed the time for reckoning the period of limitation. Thomas v. United States (D. C.) 22 F. (2d) 1000; United States v. Mabel Elevator Co. (D. C.) 17 F. (2d) 109.

The original or tentative return filed in this case disclosed a tax of $300,000, based on the best information

then available—a tax in fact much larger than was the tax actually due. It was made on the form and in the manner required by the Commissioner and was the only return that could then have reasonably been made. It did not extend the time for payment of the tax disclosed, for the taxpayer was required to pay and did pay the first installment of $75,000 on the filing of the return, when under the law it was mandatory that payment of the first installment of the tax should be extended, if it was not the return required, but the mere grant of an extension of time for filing a return. It was the return that put the tax statute into operation as respects the payment of the particular tax, and caused the penalty feature of the law to become operative in case the taxpayer failed to pay at the appointed time. And the logical conclusion is that it was the return that also put the statutory period of limitation into operation; and we so hold.

The Commissioner unquestionably had authority to inaugurate and require the tentative return method of collecting the tax and the presumption is that he did so in conformity with law. Updike v. United States (C. C. A.) 8 F. (2d) 913; sections 1305 and 1309 of the Revenue Act of 1918 (40 Stat. 1142, 1143); and sections 1300 and 1303 of the Revenue Act of 1921 (42 308, 309 [26 USCA §§ 1244, 1254]). As the time for assessing and collecting the additional tax expired March 14, 1925, before the tax was assessed or collected, and before the Revenue Act of 1924 was enacted, the assessment and collection was unauthorized, and the judgment of the court below must be affirmed.

The judgment of the District Court is affirmed, with costs to appellee in this court.